

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: MARY BERGHUIS, WARDEN, Petitioner, v. DIAPOLIS
SMITH.
CASE NO: No. 08-1402
PLACE: Washington, D.C.
DATE: Wednesday, January 20, 2010
PAGES: 1-57

ALDERSON REPORTING COMPANY
1155 CONNECTICUT AVE., NW
WASHINGTON, D.C. 20036
(202) 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARY BERGHUIS, WARDEN, :

4 Petitioner :

5 v. : No. 08-1402

6 DIAPOLIS SMITH. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, January 20, 2010

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:14 a.m.

14 APPEARANCES:

15 B. ERIC RESTUCCIA, ESQ., Solicitor General, Lansing,
16 Mich.; on behalf of Petitioner.

17 JAMES STERLING LAWRENCE, ESQ., Royal Oak, Mich.; on
18 behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 08-1402, Berghuis v. Smith.
5 Mr. Restuccia.

6 ORAL ARGUMENT OF B. ERIC RESTUCCIA

7 ON BEHALF OF THE PETITIONER

8 MR. RESTUCCIA: Mr. Chief Justice, and may
9 it please the Court:

10 This is really a case about the law of
11 habeas corpus for this murder conviction that was
12 obtained in the Michigan courts.

13 The issue was whether the Michigan Supreme
14 Court unreasonably applied clearly established Supreme
15 Court precedent in rejecting Mr. Smith's claim that
16 his jury was not drawn from a fair cross-section of
17 the community.

18 The Michigan Supreme Court did not act
19 unreasonably in concluding that there was no
20 unconstitutional underrepresentation and that there
21 was no systematic exclusion. This Court's decision in
22 Duren did not require a different result on either
23 point, and this Court should reverse the Sixth
24 Circuit.

25 I think it's important to note that there

1 are two prongs at issue: The fair and reasonable
2 representation prong and the systematic exclusion
3 prong. And it's also significant to understand that
4 the disparities at issue here are relatively small,
5 that the time period at issue runs from -- from April
6 of 1993 to October of 1993, where there was
7 information -- for those 6 months for which the
8 processes at play were measured.

9 And the percentage of African-Americans that
10 appeared in the venire during that time period was --
11 they comprised 6 percent of the venire, where the
12 jury-eligible population was 7.28 percent. So your --
13 so there was a 1.28 percent absolute disparity during
14 this 6-month time period. That can also be measured
15 as an 18 percent comparative disparity.

16 Now, if you compare that to the disparities
17 that are issue -- at issue in Duren, they really are a
18 magnitude of difference, that the disparities in Duren
19 involve the exclusion of women in Missouri, where they
20 comprised -- women comprised 54 percent of the
21 population and only 14.5 percent of the venire over
22 an 8-month period of time.

23 JUSTICE BREYER: The -- I don't know if this
24 is relevant or how to use it, but years ago, I took a
25 course in this kind of thing at the Kennedy School. I

1 was teaching, and they said the only way you could
2 figure out what -- what's what here is you use
3 something called "binomial theorem," and you have to
4 have, like, urns, and you imagine that there's an urn
5 with 1,000 balls, and 60 of them are red, and 940 are
6 black, and then you select them at random, and -- and
7 12 at a time. You know, fill 12 -- fill a hundred
8 with 12 in each.

9 And when we tried to do that, just for the
10 interest of it, I -- I found that you would expect,
11 with these numbers, something like a third to a half
12 of juries would have at least one black person on it.

13 Now, that may be wrong, because I am not a
14 mathematician, but -- but putting that together, it
15 looks as if there is a pretty big disparity.

16 MR. RESTUCCIA: Well --

17 JUSTICE BREYER: On the other hand, that
18 isn't what they testified to, so I guess you're going
19 to tell me just ignore it and forget it.

20 MR. RESTUCCIA: Well, if you're looking at
21 the Michigan Supreme Court decision, I think it's
22 important to note that it's not just that it would
23 have to be incorrect; it would have to be objectively
24 unreasonable under the AEDPA standard, that what's at
25 issue here is did the Michigan Supreme Court

1 unreasonably apply --

2 JUSTICE BREYER: Well, you know, maybe it's
3 the only way to do that the statistician stays with
4 these urns, which I guess they have computer programs
5 for.

6 MR. RESTUCCIA: Well --

7 JUSTICE BREYER: I -- I don't know, in other
8 words, and maybe I should just -- I hate to write
9 something, like, saying 2 and 2 is 6.

10 JUSTICE SCALIA: But we don't have any urns
11 here.

12 (Laughter.)

13 JUSTICE BREYER: No. You can skip it, if
14 you want. If there's any comment, fine.

15 JUSTICE GINSBURG: I think your point was
16 that Duren was quite different in the numbers --

17 MR. RESTUCCIA: Yes.

18 JUSTICE GINSBURG: -- starting out with
19 women 54 percent of the population, and then dwindled
20 to 14.5 percent of the -- of the jurors, available
21 jurors.

22 MR. RESTUCCIA: Yes, Your Honor.

23 CHIEF JUSTICE ROBERTS: I guess the point
24 is, just following up, it's not that you're going to
25 say 2 plus 2 is 6. I suppose, under AEDPA, all you

1 have to do is say 2 plus 2 is somewhere between 3 and
2 5, right?

3 MR. RESTUCCIA: Right. That it's not
4 unreasonable, and I think the best evidence of the
5 fact that this decision was not unreasonable is I --
6 in the blue brief, I put together a table of what the
7 other circuits have done with comparable statistical
8 disparities.

9 And it runs -- from the First Circuit
10 through Tenth Circuit, I have seven circuits' worth of
11 opinions, and of course, there really are additional
12 cases, if you examine this. And if you look at the
13 kinds of disparities that have been examined by other
14 courts on --

15 JUSTICE STEVENS: May I interrupt with this
16 question that goes both to what Justice Ginsburg asked
17 and the other? Should we treat all areas the same,
18 depending -- say it's -- the disparity between a
19 jurisdiction which has only 3 or 4 percent of a
20 minority should be treated similarly to a jurisdiction
21 where they have 30 or 40 percent?

22 MR. RESTUCCIA: Well, the -- in my view,
23 this Court really didn't provide guidance in Duren
24 about how this should be measured. In fact, Duren
25 doesn't specify what kind of measurement tools should

1 be used for examining disparity.

2 JUSTICE STEVENS: But isn't it perfectly
3 obvious that you're going to have dramatic differences
4 where you only have a very small percentage, as in --
5 in Grand Rapids, for example, and where you have a
6 major percentage as you did in Duren.

7 MR. RESTUCCIA: Well, I think that's right.
8 And that's one of the reasons that on direct review
9 the courts are virtually unanimous in rejecting these
10 kinds of small disparities. So if you look at the
11 table on pages 32 and 33, the circuits, on direct
12 review, that were most comparable were the Second
13 Circuit decision in which the percentage of the
14 distinct group in the community was 7.08 percent and
15 in the jury pool it was 5.0 percent --

16 JUSTICE KENNEDY: But -- but I suppose the
17 thrust of Justice Stevens's question was that if you
18 have a very small population that we are concerned
19 with, then the disparity can be very substantial,
20 especially if you use the comparative disparity.

21 MR. RESTUCCIA: That's right. At the --

22 JUSTICE KENNEDY: And I think -- at least, I
23 was interested in that aspect of his question.

24 MR. RESTUCCIA: Well, as kind of the first
25 matter, it seems like this Court doesn't have to

1 really reach that hard question, insofar as the
2 Michigan Supreme Court's decision is entitled to
3 deference under AEDPA, meaning --

4 JUSTICE KENNEDY: Yes, but we have a
5 half-hour. I'd kind of like to know how to --

6 MR. RESTUCCIA: Okay. No, I understand. I
7 understand. I just want to make that as kind of a
8 first point. Now, for the second point, it seems to
9 me that the absolute disparity test is the better
10 measure for examining -- examining these questions.
11 And the reason for that is that it objectively
12 captures the number of missing jurors that are part of
13 the venire, whereas the --

14 JUSTICE GINSBURG: But you -- but your test
15 is 10 percent. And if you have a minority, what is it
16 here? 7 point -- whatever it is. 7 --

17 MR. RESTUCCIA: 7.28.

18 JUSTICE GINSBURG: It's under 10 percent.
19 That would mean that a district is free to just
20 disregard all the people who are under 10 percent of
21 the population.

22 MR. RESTUCCIA: The 10 percent test is not
23 really necessarily tied to the absolute disparity. In
24 other words, this Court could conclude that the
25 absolute disparity test is the better test without

1 using that 10 percent threshold. The reason I suggest
2 the 10 percent threshold is that's really what's
3 happening on the ground in the Federal courts. It's
4 very hard to find a case in which there's a --

5 JUSTICE SOTOMAYOR: You would suggest that
6 in a population that has 9 percent of any group,
7 protected group, that if they didn't have one person
8 serve on a jury per year of that group, that that
9 would not -- under an absolute disparity test using
10 the 10 percent figure, that would not give rise to any
11 kind of suspicion?

12 MR. RESTUCCIA: That's right. Under -- if
13 this Court adopted it --

14 JUSTICE SOTOMAYOR: It would need the
15 Duren's second prong.

16 MR. RESTUCCIA: That's right. If the Court
17 --

18 JUSTICE SOTOMAYOR: Does that make any sense
19 to you?

20 MR. RESTUCCIA: It reflects the actual
21 practice of the courts because of the -- if you look
22 at the --

23 JUSTICE SOTOMAYOR: Well, I don't think that
24 -- that any court has suggested that the complete
25 absence of the protected group in that kind of number

1 wouldn't give rise to a fair representation claim.
2 That's why this Court, the Michigan court, and many
3 others have said that the absolute disparity test just
4 can't be used in every circumstance.

5 MR. RESTUCCIA: Well, the -- it seems --
6 looking at what the Federal courts have done, they've
7 all -- they've generally used multiple tests. Now,
8 there are several circuits that have relied on this 10
9 percent threshold, but it's not necessary for the
10 State to prevail in order for this Court to adopt the
11 10 percent threshold.

12 JUSTICE SOTOMAYOR: I don't. The question I
13 have you for you is -- that's what you have been
14 advocating, or at least your brief suggested we
15 should. Wouldn't it be better for to us leave this in
16 the hands of the courts to sort of figure out what
17 test is better under what circumstances than us
18 announce a flat rule that would lead to a result like
19 the example that I just used?

20 MR. RESTUCCIA: I -- I understand that
21 point. The reason that I'm suggesting a threshold
22 also is it corresponds to a practical aspect of the
23 application of these rules. The -- if you have a
24 sufficiently small absolute disparity, as a matter of
25 probability, it's not likely to affect the actual

1 composition of the petit jury.

2 JUSTICE SOTOMAYOR: Well, I agree that if a
3 protected group is 1 percent of the population, that
4 it's not likely that their absence is going to give
5 rise to any flags.

6 MR. RESTUCCIA: Right.

7 JUSTICE SOTOMAYOR: But I think there is a
8 difference. I don't -- I just don't know
9 statistically where. And we have to leave this in the
10 judgment of the lower courts as to where between 1 and
11 9 or 1 and 10 a difference makes sense. And that's
12 what the courts are saying, is: We can't use one test
13 to determine that.

14 MR. RESTUCCIA: Well -- and one of the
15 concerns I have is I -- for example, I know in Kent
16 County that if you look at the other distinct groups -
17 - you look at the 1990 census for Kent County, it was
18 comprised of 2 point -- 2.9 percent Latino-Americans,
19 1.1 percent Asian-Americans, and 0.6 percent Native
20 Americans.

21 Now, if you look at the one month that's
22 been placed at issue, in which Mr. Smith is indicating
23 that there was an 35 percent comparative disparity for
24 that one month, if that becomes the threshold, the
25 standard used, which the Sixth Circuit concluded was -

1 - established a violation of the second prong, then if
2 you think about the practical application that -- for
3 Michigan, for Kent County, if you take your 158 jurors
4 in that jury pool, you'd expect for that one month for
5 there to be four or five Latino-Americans, two
6 Asian-Americans, and one Native American.

7 JUSTICE SCALIA: What's wrong --

8 MR. RESTUCCIA: What's missing -- I'm sorry.

9 JUSTICE SCALIA: Yes. What's wrong with a
10 rule?

11 MR. RESTUCCIA: What's wrong with what?

12 JUSTICE SCALIA: With a rule? With picking
13 a number, rather than leaving it up to the courts of
14 appeals or the district courts to use different
15 numbers, different times? I don't have to review all
16 of these cases all the time. Why don't we pick a
17 number? You want 10, right?

18 MR. RESTUCCIA: That what was I --

19 JUSTICE SCALIA: Yes --

20 MR. RESTUCCIA: That has been the practice
21 of the courts below. That's why I'm -- I'm advocating
22 it. But it does correspond to this idea that below a
23 certain point, absolute disparity will have no
24 practical -- for example, in this case, the venire at
25 issue, according to the State trial court, included 60

1 prospective jurors, and there were three
2 African-Americans, which would then constitute 5
3 percent.

4 Now, in order for that percentage to
5 correspond exactly to the jury-eligible population,
6 there would have had to have been one or two more
7 African-American jurors as part of that venire. Well,
8 as a matter of probability, if you have 12 being
9 selected from 60 -- this is kind of your point,
10 Justice Breyer -- that it's not -- it's more likely
11 than not that would have no effect on the actual
12 selection of the petit jury --

13 JUSTICE BREYER: I don't know. The one
14 thing I learned from the urn business is it never
15 turns out the way you think.

16 (Laughter.)

17 JUSTICE BREYER: For example, it had the
18 example of, like, the eight: There are eight out of a
19 hundred, and you run this thing a thousand times, and
20 you'll discover that there is one black juror on about
21 half the juries, or a third, anyway. That's much more
22 than I would have thought intuitively. And I might
23 not have even read the example correctly. So you see
24 why I -- I'm at sea, as soon as you tell me to be a
25 statistician. I even got a book called Statistician

1 for Lawyers. That didn't help me very much.

2 (Laughter.)

3 JUSTICE SCALIA: That's why Las Vegas makes
4 a profit, right?

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Well, it does
7 depend, doesn't it, on the size of the -- the urn? In
8 other words, if it's a smaller --

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: If it's 10,000 of
11 these balls and you are going to go through it 10,000
12 times, it's more likely that you are going to get a
13 sample that reflects the overall percentage, correct?

14 MR. RESTUCCIA: I think that's right. One
15 of the -- one of the reasons, also -- talking about
16 this 10 percent as a rule -- is that if you look
17 through these cases, you'll see a lot of -- a lot of
18 the courts, on direct review -- and I think -- I'm
19 going to come back to this point, that this, of
20 course, is an AEDPA case, so the question is whether
21 the Michigan Supreme Court acted unreasonably. And so
22 I think there's a different standard, that it doesn't
23 have to have gotten it right; it had to be objectively
24 unreasonable.

25 But setting that aside, you'll find many

1 cases in which there are disparities of 5 percent and
2 7 percent which have been rejected. And the reason is
3 you have neutral processes, processes that everyone
4 would agree are reasonable on their face, which result
5 in disparities for distinct groups.

6 JUSTICE KENNEDY: Are you -- are you saying
7 that systematic exclusion -- and we are assuming good
8 faith, no intent to discriminate --

9 MR. RESTUCCIA: Right.

10 JUSTICE KENNEDY: -- that systematic
11 exclusion is always proven or disproven by statistics?

12 MR. RESTUCCIA: No. I'm making just the --
13 the opposite point, that under the third --

14 JUSTICE KENNEDY: Well --

15 MR. RESTUCCIA: I'm sorry.

16 JUSTICE KENNEDY: And I'll -- I'll allow you
17 to answer, of course, but --

18 MR. RESTUCCIA: Please.

19 JUSTICE KENNEDY: If not, how do we show
20 systematic exclusion? Again, assuming good faith, no
21 intent to discriminate.

22 MR. RESTUCCIA: The Duren case involved a
23 categorical distinction, meaning women were exempted
24 in a different way than men. Women had an automatic
25 exemption. This Court didn't delineate in Duren that

1 if you had just a disparate impact based on a neutral
2 process, that that would be sufficient to give rise to
3 systematic exclusion. And that's really been the way
4 the Federal courts have applied it on direct review,
5 that there --

6 JUSTICE ALITO: The statistical issue is
7 very interesting, but I -- I wonder, if we were not
8 looking at this through AEDPA, why we -- why a court
9 should necessarily have to start with the question --
10 with the elements of the prima facie -- with the
11 question of whether there is unconstitutional
12 underrepresentation, when in the end, as I understand
13 Duren, the defendant has to identify some aspect of
14 the jury selection process that has a disproportionate
15 impact on the group involved and is unreasonable? And
16 unless that can be done at the outset, why struggle
17 with these statistics?

18 Now, here, to illustrate, the aspect of the
19 jury selection process that the Sixth Circuit thought
20 was unreasonable was the prior practice of choosing
21 the jurors first for the district courts, the
22 misdemeanor courts, rather than the circuit courts,
23 the -- the felony courts. But the -- the trial judge,
24 it seemed to me, address this in -- in a very
25 thoughtful way, and he said there just isn't any proof

1 that this old system had that effect.

2 And it's hard for me to see how it could
3 have that effect, unless the -- the number of jurors
4 chosen for the district courts in Grand Rapids was
5 disproportionate to the number chosen for the district
6 courts in the other jurisdictions within the county.
7 So that seems to me to be the end of the case.

8 And why does it make sense to -- to struggle
9 with this rather complicated statistical problem, if
10 at the end of the day, it's going to come down to
11 something of that nature?

12 MR. RESTUCCIA: I think that may be the
13 easiest way to resolve this case, because under the
14 third prong, the Michigan Supreme Court on the
15 question of jury assignment concluded that Mr. Smith
16 had failed to factually show that there was any
17 underrepresentation that arose from that process.

18 JUSTICE GINSBURG: Didn't the Michigan
19 Supreme Court do essentially what Justice Alito
20 suggested, that they said: We'll give you the benefit
21 of the doubt, go on to the third.

22 But on that third, it seems to me there's
23 nothing that shows us what was the representation in
24 the district before they made the change vis-à-vis the
25 circuit court, was there?

1 MR. RESTUCCIA: The -- the information that
2 Mr. Smith's expert provided is he -- he had -- there
3 are two jury terms that were described, one for 6
4 months, in which this juror assignment to the local
5 courts first occurred, and then 1 year for the
6 following year, in which the jury assignment did not
7 send them to the local courts first. So you have two
8 different pools that are being compared.

9 The -- if you look at page 13 of the blue
10 brief, it outlines what the disparity was according to
11 Mr. Smith's expert for the time which the assignment
12 to local courts occurred. And in that diagram, it
13 shows, at the end, that there was an 18 percent
14 comparative disparity. And that's the final column in
15 the totals.

16 Now, that's what occurred at the time of
17 which the jury assignment to the local courts occurred
18 first. The following year, the comparative disparity
19 was 15 percent, where the -- where the jurors were not
20 sent to local courts first. In other words, there was
21 a difference of a 3 percent comparative disparity.

22 Now, no one suggests that a 3 percent
23 comparative disparity could -- could justify a claim
24 of a violation of Duren. It's -- it's not
25 statistically significant, because when you talk about

1 3 percent comparative disparity or 4 percent
2 comparative disparity, you are talking about two or
3 three jurors over the entire time period --

4 JUSTICE GINSBURG: That -- that's in the --
5 in the circuit court. Do we know what the figures
6 were just for the district court?

7 MR. RESTUCCIA: No. There -- there was no
8 information -- the reason -- the Michigan Supreme
9 Court ultimately rejected the claim on the jury
10 assignment process because there was no evidence other
11 than anecdotal testimony about how sending jurors to
12 local courts would result in a deficiency of
13 African-Americans in the circuit court or the felony
14 court -- courts. So that was the basis.

15 They -- so in a way, this touches on
16 Wood v. Allen. It was a factual determination,
17 whether it's under 2254(d)(2) or 2254(e)(1). The
18 Michigan Supreme Court's conclusion that Mr. Smith had
19 failed to show factually that there was any
20 underrepresentation that arose from the jury
21 assignment process is entitled deference.

22 JUSTICE STEVENS: But isn't it possible --
23 it's awfully hard to get these percentages when you
24 get small numbers, as you do. But doesn't it seem
25 intuitively obvious that if you give the district

1 courts first crack of -- of the size of the pool that
2 has more of the African-American potential jurors in
3 it than the other, that it's -- it's bound to have an
4 impact?

5 MR. RESTUCCIA: No. There's -- there's no
6 logical necessity that sending courts -- because you
7 understand that you have the entire county, and the
8 county is then broken up into districts?

9 JUSTICE STEVENS: Right.

10 MR. RESTUCCIA: And the districts are the
11 local courts. and they are misdemeanor courts.

12 JUSTICE STEVENS: But -- but there's a much
13 higher percentage of African-Americans in Grand Rapids
14 than there is in the county as a whole.

15 MR. RESTUCCIA: That's right. But all those
16 other outlying areas also have to send their jurors to
17 the district court first, too. It's not like it's
18 just one segment gets sent to the district court. All
19 of the jurors get sent to the district courts first.
20 The only -- the -- the proof required to show that
21 somehow the district court for Grand Rapids went
22 through more jurors than did the other local courts
23 proportionately --

24 JUSTICE STEVENS: But -- but the jurors that
25 served on the district court, were they -- were they

1 taken from the entire county, too, or just from Grand
2 Rapids?

3 MR. RESTUCCIA: No, they were -- all of
4 the -- all of the district courts -- Grand Rapids,
5 Rockford, all of these small municipalities -- drew
6 from the circuit court pool.

7 JUSTICE STEVENS: So the district court
8 jurors could -- could include as many jurors who are
9 not from Grand Rapids as they could from Grand Rapids?

10 MR. RESTUCCIA: Exactly.

11 JUSTICE STEVENS: I see.

12 MR. RESTUCCIA: In other words, the proof --

13 CHIEF JUSTICE ROBERTS: I'm sorry. That --
14 I'm confused.

15 MR. RESTUCCIA: That's all right.

16 CHIEF JUSTICE ROBERTS: I thought it was the
17 other way around. I thought Grand Rapids gave however
18 many -- you know, 30 percent to the pool and then took
19 Grand Rapids people back?

20 MR. RESTUCCIA: It does take Grand Rapids
21 people, that's right. That's how it happens. You're
22 drawing from the entire county.

23 I'm sorry if I -- if I've -- if I've stated
24 it in a way that's misleading. I apologize.

25 JUSTICE STEVENS: I -- apparently, we were

1 not communicating correctly.

2 MR. RESTUCCIA: All of the jurors from the
3 entire county are drawn into one pool.

4 JUSTICE STEVENS: Right.

5 MR. RESTUCCIA: And then the -- the local
6 courts can identify those people that came from within
7 their jurisdiction and draw them out.

8 JUSTICE STEVENS: So the --

9 MR. RESTUCCIA: Everyone does it.

10 JUSTICE STEVENS: So the jurors who served
11 on the district court were primarily from Grand
12 Rapids, rather than Kent County as a whole?

13 MR. RESTUCCIA: The -- there's no
14 information to -- in the record --

15 JUSTICE STEVENS: Well, let me just ask
16 you --

17 MR. RESTUCCIA: -- that indicates that.

18 JUSTICE STEVENS: -- a factual question.
19 Could they put on the district court jurors who did
20 not come from Grand Rapids?

21 MR. RESTUCCIA: No. The -- the district
22 court for Grand Rapids had to be Grand Rapids
23 residents. You're exactly right.

24 JUSTICE STEVENS: So, then, inevitably, if
25 you give the district court jurors first, a pool of

1 African-American jurors are going to be larger serving
2 in the district court than in the -- in the felony
3 court.

4 MR. RESTUCCIA: It all depends on the local
5 courts and their usage of jurors. If -- if Grand
6 Rapids actually required fewer jurors, it would -- it
7 would result in a larger number of African-Americans
8 being present on the circuit court.

9 The whole concept underlying the claim
10 that -- that this had a disproportionate effect is the
11 idea that Grand Rapids must have needed
12 proportionately more jurors than the other local
13 courts might.

14 JUSTICE BREYER: Okay. So, is there anybody
15 who said whether -- if all -- they all take their
16 jurors first, the districts, and Grand Rapids uses a
17 higher percentage of jurors. So now there -- and they
18 have more of the black jurors, so that there are fewer
19 left over --

20 MR. RESTUCCIA: That would be the argument.

21 JUSTICE BREYER: That could be. Now, is
22 there any -- in this record, does anybody say whether
23 that's okay or not? I mean, to -- to have people
24 serve jury duty near where they live or nearer where
25 they live, on its face, is not so bad. Did -- did

1 anybody say whether this is good or bad?

2 MR. RESTUCCIA: Well, there wasn't really
3 testimony whether it was good or bad. The -- the
4 anecdotal information was that it -- it took
5 African-American jurors out of the larger pool. The
6 anecdotal information from the court administrator
7 was: We were afraid this process was draining --
8 "siphoning" was the language -- siphoning jurors from
9 the circuit court.

10 JUSTICE BREYER: Are you --

11 JUSTICE SCALIA: Do you have to be a -- a
12 resident of the district in order to serve as a juror
13 in the district court?

14 MR. RESTUCCIA: Yes.

15 JUSTICE SCALIA: You have to be?

16 MR. RESTUCCIA: That's right.

17 JUSTICE SCALIA: So then if this system were
18 not in effect, and if Grand Rapids had to take white
19 jurors from other counties as opposed to a larger
20 percentage of black jurors from Grand Rapids, then
21 you'd you have a claim in Grand Rapids, wouldn't you?

22 MR. RESTUCCIA: It would create a problem in
23 Grand Rapids. That's right.

24 JUSTICE SCALIA: Well, you -- you'd have a
25 jury pool in Grand Rapids that wouldn't reflect the

1 larger number of blacks in Grand Rapids.

2 MR. RESTUCCIA: That's exactly right.

3 JUSTICE SCALIA: So you're damned if you do
4 and damned if you don't, right?

5 MR. RESTUCCIA: I think that's right.

6 CHIEF JUSTICE ROBERTS: So -- so do we
7 have any evidence in the record that -- I gather this
8 whole claim depends upon Grand Rapids having more need
9 for jurors per capita than anywhere else?

10 MR. RESTUCCIA: That's exactly right.

11 CHIEF JUSTICE ROBERTS: So do we have any
12 evidence in the record that that's the case?

13 MR. RESTUCCIA: Nothing other than the
14 anecdotal testimony. Like, for example, the court
15 administrator said it is believed that this process
16 results in a reduction in the number of jurors -- of
17 African-American jurors --

18 CHIEF JUSTICE ROBERTS: I would suppose
19 that's something we could find out pretty easily,
20 right? I mean, you look and see how many jurors are
21 pulled for -- how many jurors Grand Rapids needs in a
22 particular period --

23 MR. RESTUCCIA: That's right.

24 CHIEF JUSTICE ROBERTS: -- compare it to how
25 many jurors Rockland needs.

1 MR. RESTUCCIA: Right. And that information
2 was not provided, and that's one of the reasons the
3 Michigan Supreme Court rejected the claim factually,
4 that it had not been demonstrated.

5 And, in fact, if you look at the information
6 that Mr. Smith's expert put forward, it really
7 confirms that the -- even the best showing for Mr.
8 Smith is a very small correlation. I mean, you're
9 talking about a 3 or 4 percent comparative disparity
10 difference.

11 JUSTICE KENNEDY: Let me get that. If -- if
12 a procedure routinely results in statistical
13 underrepresentation that is significant, is that not a
14 clear showing of systematic exclusion?

15 MR. RESTUCCIA: It would have to be
16 significant, and I don't think there's --

17 JUSTICE KENNEDY: Well, yes -- no, that's --
18 it's a hypothetical.

19 MR. RESTUCCIA: Oh, if the --

20 JUSTICE KENNEDY: Routinely results in
21 significant underrepresentation, then that is
22 automatically systematic exclusion?

23 MR. RESTUCCIA: Not -- not under my reading
24 of Duren. I don't think that would be -- I don't
25 think that's the -- the proper rule. And I -- the

1 reason --

2 JUSTICE GINSBURG: And then they would not
3 have -- have gone on to the systemic issue, because
4 the disparity was so marked, just on the -- just on
5 the numbers?

6 MR. RESTUCCIA: Well, I -- I don't think the
7 numbers were sufficient to justify --

8 JUSTICE KENNEDY: I mean, isn't the -- I'm
9 trying to think about the third prong of -- of --

10 MR. RESTUCCIA: Right.

11 JUSTICE KENNEDY: -- of Duren. Isn't -- if
12 it's routine and it's predictable and it's constant,
13 isn't that always due to systematic exclusion?

14 MR. RESTUCCIA: And that's the argument
15 being raised by Mr. Smith. No, I think the answer is
16 no. And the reason I say that is this: You have --
17 the Federal courts, on direct review, have looked at
18 voter registration and challenges to voter
19 registration. Voter registration may have a disparate
20 -- or affect distinct groups differently.

21 In the same way that the Second and Tenth
22 Circuit have looked at cases where they failed to
23 follow up on non-returns, that -- if you don't follow
24 up on non-returns, it may affect distinct groups
25 differently. The analysis of the Federal courts on

1 that issue has been that the decisions to exempt
2 yourself from jury service or the failure to respond
3 to an invitation for jury service is outside the
4 system. Even if it occurs regularly and is
5 persistent, it's still not inherent in the process.

6 That's what the Michigan Supreme Court said
7 here about the excuses for hardship and
8 transportation -- for the excuses. But it's also true
9 that the process by which you select jurors in
10 district courts is not something that is a systematic
11 exclusion of anyone. It's -- on its face, it is
12 neutral, and if you -- if this Court concludes that
13 neutral practices like sending out -- using a certain
14 body, whether voter registration or if it's driver's
15 licenses and Michigan identification cards, or not
16 following up on non-returns, or allowing excuses for
17 hardship, or -- or assigning jurors to a district
18 court first, if that is -- can result in systematic
19 exclusion, what's going to happen is that all these
20 neutral processes that Michigan has may result in
21 disparities.

22 And so, as it stands now, Kent County
23 doesn't identify the race and ethnicity of all its
24 jurors. Well, it's going to have to if it's going to
25 have to have this perfect correspondence of the

1 jury-eligible population. It will no longer have this
2 kind of blind neutrality --

3 JUSTICE ALITO: But concluding that it's
4 systematic doesn't mean that the defendant wins. It
5 just means that the State has to -- has to justify the
6 -- the mechanism that's causing -- that's causing this
7 -- this situation.

8 MR. RESTUCCIA: That's true. There is --
9 there is then the rebuttal. But then what happens is
10 you are subject to these challenges. The question is:
11 Does the court -- does the State ever wish -- ever
12 wish to be in a position of having to be subject to
13 the challenge?

14 But -- but I think I want to come back to --
15 one of the prevailing points of all of this is that
16 this is also the Michigan Supreme Court. There's no
17 question that it had reached the merits and was
18 entitled to AEDPA deference. And the -- the question
19 was: Was there adequate guidance to the State of
20 Michigan to know that this was both systematic -- that
21 this was systematic exclusion and inherent in the
22 process? And Duren was not clear on that point.

23 The -- the analysis of the Michigan courts
24 really corresponds quite closely to what the Federal
25 courts have done, so it cannot be objectively

1 unreasonable. And if there --

2 JUSTICE GINSBURG: One point of information:
3 What is the Michigan ID?

4 MR. RESTUCCIA: Oh, what happens if you
5 don't have it -- some people don't have a right to a
6 driver's license, so you can still obtain an
7 identification card even if you are not able to drive.
8 So it's to try to get a wide a group as possible for
9 your pool of jurors.

10 And if there are no --

11 JUSTICE STEVENS: Let me ask this factual
12 question: Am I correct in understanding that Michigan
13 in fact has changed the practice with regard to giving
14 priority to --

15 MR. RESTUCCIA: That's right.

16 JUSTICE STEVENS: Yes.

17 MR. RESTUCCIA: That's right.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Lawrence.

20 MR. LAWRENCE: Okay.

21 ORAL ARGUMENT OF JAMES STERLING LAWRENCE

22 ON BEHALF OF RESPONDENT

23 MR. LAWRENCE: Mr. Chief Justice, and may it
24 please the Court:

25 If the annual jury call of minorities at the

1 courthouse in Grand Rapids is down by 7.28 percent of
2 the total number of jurors called, that means if it
3 happens in Detroit, that means almost nothing, but if
4 it happens in Grand Rapids, that's every minority.
5 The Petitioner's goal is to have this Court enshrine
6 into law a rule that the two situations are exactly
7 the same.

8 CHIEF JUSTICE ROBERTS: If you had a
9 community with one African-American, your argument
10 would be the same, if that's the disparity? That
11 means every -- every minority is left off the jury.

12 MR. LAWRENCE: Well, I think that certainly
13 if you adopt the Petitioner's test for 60 percent of
14 the country, Duren would not apply regarding
15 African-Americans; 90 percent of the country, wouldn't
16 apply to Hispanics; and Duren protections would never
17 apply to Native Americans anywhere.

18 CHIEF JUSTICE ROBERTS: I guess I'm -- I
19 guess I'm echoing Justice Stevens's question of
20 whether or not this type of statistical analysis
21 really works when you're dealing with relatively small
22 numbers.

23 MR. LAWRENCE: Well, I would make this
24 observation: That in Duren v. Missouri, on page 366,
25 the Court stated, "His undisputed demonstration that a

1 large discrepancy occurred, not just occasionally, but
2 in every weekly venire for a period of nearly a year,
3 manifestly indicates that the cause of the
4 representation was systematic -- that is, inherent in
5 the particular jury selection process utilized."

6 JUSTICE GINSBURG: Yes, but there you were
7 dealing with an express exemption. There was an
8 exemption for (a) women, and also in the record was
9 that the jury clerk was sending out notices saying:
10 Women, if you do not wish to serve, return the summons
11 to the judge named on the reverse side as quickly as
12 possible. And then, further -- systematic -- if the
13 card was not returned, if a card sent to a woman was
14 not returned, it was automatically assumed that she
15 did not wish to serve. There was no follow-up.

16 So there was all kinds of evidence of
17 systematic problems in Duren that are not present
18 here.

19 MR. LAWRENCE: Well, first of all, that's
20 completely correct; however, the rule in Duren, the
21 U.S. Supreme Court stated that the numbers alone prove
22 systematic. Then the Court --

23 JUSTICE GINSBURG: Where did the Court say
24 that?

25 MR. LAWRENCE: On page 366. And then in --

1 the Court went on to say that the State is arguing
2 that there's various neutral, benign reasons for the
3 underrepresentation --

4 JUSTICE SCALIA: Excuse me. You -- if that
5 statement is true, then -- then there is -- there's no
6 third part to the three-part test. I thought Duren
7 established a three-part test.

8 MR. LAWRENCE: It did.

9 JUSTICE SCALIA: And the third one was that
10 you had to establish -- after having already
11 established the disparity, you had to establish that
12 there was a selection process which caused the
13 disparity. And you are telling us that you don't have
14 to proceed to step 3. Once you show the disparity, it
15 is assumed that it is the product of the system.

16 MR. LAWRENCE: Well, Justice Scalia, my
17 reading of Duren does indeed include that third test,
18 but the problem is, is that Duren puts the burden of
19 proof on that test on the State. They said at pages
20 368 to 369 that the State is claiming there were all
21 sorts of neutral, legitimate reasons for the
22 underrepresentation --

23 JUSTICE GINSBURG: Oh, that was after --
24 that was after showing the systematic factors. It was
25 the plaintiff's burden -- or the defendant in the

1 case, Duren -- burden to show there was a systematic
2 factor. That was the automatic exception for a woman
3 and how it worked in practice. After all of that,
4 then Justice White tells us, the State could still
5 come back and say yes, that's true, but there were
6 other reasons why women didn't show up. Maybe they
7 were disproportionately elderly, or maybe they were
8 involved with child care.

9 That's what -- that's what Duren said, that
10 the -- showing a systematic factor was the plaintiff's
11 burden, and then the State could justify why the
12 numbers came out that way.

13 MR. LAWRENCE: Well, we did show a number of
14 systematic factors, but if you look at Duren itself,
15 on page 366 it says, the numbers alone proved it. On
16 -- further on 366, they stated that Duren --

17 JUSTICE SCALIA: How do you reconcile that
18 with the third test? Please tell me how you reconcile
19 that statement with the fact that it did set forth a
20 three -- a three-prong test.

21 MR. LAWRENCE: Well, I believe that we met
22 the three-prong test, but I feel that it is an error
23 in reading Duren to say anything other than that: The
24 State must show how this came about, not the
25 defendant.

1 JUSTICE GINSBURG: Where does it say that?

2 MR. LAWRENCE: -- did show it, and --

3 JUSTICE GINSBURG: Where does it say that?

4 MR. LAWRENCE: It says that at pages 368 to
5 369. And the --

6 JUSTICE ALITO: It says that the State has
7 to show that it has a reason, a good reason, for --
8 the aspect of the selection process that has been
9 identified as causing the disparity.

10 But does it say that it's the State's
11 obligation to go through every factor that may cause
12 the disparity and justify every one? Or is it the
13 defendant's obligation to point to some aspect of the
14 selection -- of the -- of the system that causes the
15 disparity? Then once the defendant identifies that,
16 then the State can show if it -- can try to show that
17 there's a good reason for it.

18 MR. LAWRENCE: Well, I would read one
19 sentence from Duren, if I could: "Assuming, arguendo,
20 that the exemptions mentioned by the court below would
21 justify failure to achieve a fair community
22 cross-section on jury venires, the State must
23 demonstrate that these exemptions caused the
24 underrepresentation complained of."

25 And I think that all of the courts, all

1 along the way, including Michigan's supreme court,
2 have overlooked that important principle.

3 CHIEF JUSTICE ROBERTS: Do I understand your
4 siphoning theory to depend upon Grand Rapids drawing a
5 disproportionate number of jurors from the pool?

6 MR. LAWRENCE: That is --

7 CHIEF JUSTICE ROBERTS: That results in
8 fewer minorities going up to the county court, right?

9 MR. LAWRENCE: That's right. Because those
10 jurors that were pulled out for district court, many
11 of them did not serve in district court. The majority
12 did not, but they were still removed from --

13 CHIEF JUSTICE ROBERTS: Removed from the
14 county --

15 MR. LAWRENCE: -- from the overall pool.

16 CHIEF JUSTICE ROBERTS: Where -- where in
17 the record is it established that Grand Rapids had a
18 disproportionate need for jurors from the pool?

19 MR. LAWRENCE: I don't believe either side
20 established that.

21 CHIEF JUSTICE ROBERTS: Well, if it's -- if
22 your theory depends upon Grand Rapids drawing a
23 disproportionate number and it is not in the record
24 that Grand Rapids drew a disproportionate number, I
25 think that means you lose.

1 MR. LAWRENCE: Well, I would respectfully
2 disagree with the Court because it is not necessary,
3 in our view, that each specific item that led to
4 underrepresentation be, itself, something that's
5 unconstitutional, but rather, the collective nature of
6 it, that 15 out of 17 months persistently and
7 repeatedly came up with substantial
8 underrepresentation. You are talking about 34.8
9 percent here.

10 JUSTICE ALITO: But that's the only factor
11 that the Sixth Circuit identified as illegitimate, was
12 this -- was this siphoning system.

13 MR. LAWRENCE: Well, I feel that --

14 JUSTICE ALITO: It rejected everything else,
15 didn't it?

16 MR. LAWRENCE: I feel that there are a
17 number factors. I suppose that we could do it on the
18 basis of height and then be surprised when there's
19 fewer women on the jury.

20 JUSTICE BREYER: Now, why is it -- I'm just
21 not clear in my mind. Why is this siphoning bad? My
22 impression, which may be wrong, is you -- you have a
23 thousand people in the room, let's say, and if you let
24 the district courts choose first, people will serve
25 nearer where they live.

1 Now -- and so most of them would rather
2 serve nearer where they live. And the result of that
3 could be, for the reasons that were stated, that then
4 there are fewer minorities on the more general jurors
5 that draw from a wider area, And I don't know about
6 the merits of that.

7 I mean, I see a negative, and I see a
8 positive. So is it -- it doesn't seem to me obviously
9 bad, nor is it obviously good. So what should I do?

10 MR. LAWRENCE: Well, the record showed --

11 JUSTICE BREYER: Right.

12 MR. LAWRENCE: -- that the people who were
13 actually showing up for the jury panels at circuit
14 court were very heavily overrepresented in the rural
15 areas of Kent County and heavily underrepresented --

16 JUSTICE BREYER: Well, but -- but that's
17 just the explanation of the problem that we're seeing.

18 MR. LAWRENCE: Right. Well, I guess --

19 JUSTICE BREYER: The problem we're seeing is
20 that if Grand Rapids has a higher juror utilization
21 rate and they have a higher minority population, then
22 you will end up with the leftover juries having a
23 lower minority population.

24 Now, the explanation for that is that you
25 choose the district judges -- you choose the district

1 jurors first. My question to you is: I -- if you're
2 just a -- I'm not instructed in this area. If you
3 were just to tell me, what do I think of that, I would
4 say I'm not sure.

5 I think you have fewer minorities, that's
6 true, but people get to serve closer to home. Now --
7 now, can you enlighten me a little bit about this?

8 MR. LAWRENCE: Yes. Well, first of all,
9 Grand Rapids has several district courts, and the
10 largest one is the district court for the city of
11 Grand Rapids. And as one would predict, the judicial
12 business of a large city is certainly going to be more
13 extensive than the judicial business in rural areas.

14 CHIEF JUSTICE ROBERTS: Of course. Of
15 course, but we have to look at this on a proportional
16 basis, right? Grand Rapids is also sending a higher
17 number of jurors to the pool than -- than the small
18 rural county.

19 MR. LAWRENCE: Well --

20 CHIEF JUSTICE ROBERTS: Your -- your theory
21 depends upon Grand Rapids drawing not just a
22 proportional number, if it's contributing 30 percent
23 and it draws 30 percent; your theory depends upon
24 Grand Rapids contributing 30 percent to the pool and
25 drawing 40 percent.

1 MR. LAWRENCE: Well, I guess I would simply
2 say that the court administrator testified and the
3 district judge found that they had substantial
4 underrepresentation that was very noticeable, very
5 visible, a severe problem, and after my client's
6 trial, they -- they concluded that the best way of
7 dealing with this was to end the siphoning process,
8 which they did.

9 JUSTICE SOTOMAYOR: And so, what -- what did
10 it result in? It resulted over a 6-month period and a
11 difference between 18 percent underrepresentation and
12 15 percent. And your adversary says that's not a
13 statistically meaningful difference, that 3 percent,
14 because it only takes a difference of a couple of
15 people to change it from 18 to 15.

16 MR. LAWRENCE: Well, I --

17 JUSTICE SOTOMAYOR: What's -- what's
18 unreasonable about that argument?

19 MR. LAWRENCE: Well, I have two answers to
20 that. The first one being that what -- one thing that
21 was eliminated was the spikes, like we had in my
22 client's month, 34.8, even though the average
23 underrepresentation was only 18.1.

24 JUSTICE SOTOMAYOR: You can't -- you are
25 comparing apples and oranges, because your pre-spike

1 was over a year and your post-spike was over 6 months.
2 We don't know what would have happened -- or didn't
3 have statistics of a year or longer.

4 MR. LAWRENCE: Okay. Well, in the case of
5 Duren, you're talking about -- they had a 10-month
6 period that was involved, but as for the numbers being
7 small, I can only refer you to cases that I very much
8 disagree with -- United States v. Sanchez-Lopez, cited
9 in my brief, where Hispanics comprised 5.59 percent of
10 the southern district of Idaho -- and the court
11 basically said: Since that's less than 10 percent,
12 who cares if there are Hispanics on the juries? The
13 same in United States --

14 JUSTICE BREYER: Well, I wouldn't say that,
15 but I still haven't -- I will try again. Forget the
16 cases.

17 As I'm hearing this, all I'm hearing is:
18 Well, if you let the -- if you say that the wider area
19 should choose first, you will get a higher number of
20 minorities, but very tiny number; I mean a very small
21 addition, one or two people. And if you do it the way
22 they're doing it, you'll lose those one or two people,
23 but you will let people serve closer to home.

24 So I just think -- as a person, not as a
25 judge -- that's why I am letting you answer it as a

1 judge -- but I mean, I'd say, well, it doesn't sound
2 like much of a big deal. And -- and I do see an
3 advantage in this, of the way they are doing it, so,
4 now, you tell me what's -- what's wrong with that?

5 MR. LAWRENCE: Okay. Well, first of all,
6 Kent County is not really that big. It's -- anybody
7 can drive from the farthest end of the county to
8 downtown Grand Rapids in approximately 20 to
9 30 minutes. It wouldn't be that difficult to get
10 there. I bet members of this Court have a longer
11 commute.

12 But, more importantly, the -- the fact that
13 you're only talking about 25 people out of 2,250
14 people simply means that the problem will be easy for
15 court administrators to solve, if they have an
16 incentive to do it.

17 CHIEF JUSTICE ROBERTS: How is that? Don't
18 those people then have to become professional jurors?
19 They have to serve on every jury, or you're going to
20 have the disproportion that the statistics show.

21 MR. LAWRENCE: Well, the statistics showed,
22 for example, that African-Americans had a much higher
23 rate of not having an automobile. And so if you say,
24 well, if you have trouble getting a ride, you could
25 tell somebody, come on down anyway; or you can say,

1 that's all right, take the day off.

2 And if African Americans have a very
3 substantial higher rate of single-parent households,
4 well, then, of course, it's going to be harder to get
5 a babysitter. Now, you can tell those people, well,
6 that's okay, stay home; or you can say, try to get
7 down here anyway.

8 And the court -- and if somebody simply
9 didn't show up, statistics have shown, in the brief --

10 JUSTICE GINSBURG: May I stop you there for
11 a moment? Because one of the things that was in the
12 Duren opinion was that a child care excuse would be
13 okay. I think Justice White said at the end, now, I'm
14 not touching the typical hardship excuses, and one of
15 them was child care, and that is -- certainly, in the
16 early '70s, was going to disproportionately affect
17 women. You have far fewer women if you give a child
18 care exemption.

19 MR. LAWRENCE: No doubt that that's true,
20 and I am not saying that it is wrong to give real
21 hardship exemptions. Here --

22 JUSTICE GINSBURG: But this -- he wasn't
23 talking about individual cases.

24 MR. LAWRENCE: Well, in this case, one of
25 the things that happened is that, if somebody

1 didn't -- simply didn't show up, that's it. Now,
2 judges -- the court administrator said, yes, we tried.
3 The judges would issue orders to show cause, but the
4 police department made a decision that they were not
5 going to have anything to do with the serving or
6 participation in these orders to show cause, orders to
7 show up.

8 And isn't that police department decision
9 part of the system? It is systematic. When the
10 police --

11 JUSTICE STEVENS: Let me just --

12 MR. LAWRENCE: -- tell the courts what to
13 do, shouldn't the courts tell the police what to do?

14 JUSTICE STEVENS: Let me make sure I
15 understand your position. Assume that there is an --
16 an identifiable disparity of 2 percent or 3 percent,
17 or whatever it might be to get to the threshold of any
18 significance, that's entirely caused by the fact that
19 the members of the minority have personal excuses that
20 justify non-service. What do you do with that case?
21 Do you find that it was -- it's unconstitutional, or
22 don't you?

23 MR. LAWRENCE: If you find that it is
24 persistent, month in and month out --

25 JUSTICE STEVENS: It is. It's assuming --

1 MR. LAWRENCE: -- then you have a problem
2 because society benefits when jurors are drawn from
3 the broadest spectrum of the system.

4 JUSTICE STEVENS: I didn't --

5 JUSTICE KENNEDY: Well, that's policy.
6 Can't you say that that is systematic exclusion
7 because it's part of the system?

8 MR. LAWRENCE: Well --

9 JUSTICE STEVENS: But is it
10 unconstitutional, is what I'm trying to find out.
11 Society benefits because -- if you make them serve;
12 the society benefits if you grant the excuses, too.

13 MR. LAWRENCE: Well, overall, there's
14 nothing wrong with granting excuses for genuine
15 hardship; however, when you have this factor and
16 factor 2 and factor 3 and factor 4, and they
17 persistently come up with all-white juries, that's
18 what Richard Hillary testified to, 98 percent of the
19 time, nothing, but all-white juries.

20 And if somebody could --

21 JUSTICE GINSBURG: Is there -- is there a
22 Federal district that corresponds to this Kent County?
23 Is there a Federal district court that would be
24 calling jurors in -- in the same geographical area?

25 MR. LAWRENCE: Well, there is the United

1 States District Court for the Western District of
2 Michigan that covers a very large amount of territory,
3 and, frankly, I have not studied their statistics, but
4 I know, from personal knowledge, that the
5 African-American population in the Western District of
6 Michigan would be smaller than in Kent County or in
7 the city of Grand Rapids, where --

8 JUSTICE GINSBURG: But you don't have -- you
9 don't have comparable -- comparable records for what
10 was going on in the -- in the district court?

11 MR. LAWRENCE: Well, if you mean the United
12 States District Court --

13 JUSTICE GINSBURG: Yes.

14 MR. LAWRENCE: No, I -- I have not studied
15 that situation, and --

16 JUSTICE ALITO: Are there -- are there
17 courts that you know of that do what you are
18 suggesting needs to be done? When a juror don't show
19 up, the judge issues a bench warrant, and -- and the
20 police are sent out to arrest the person and drag the
21 person into court, or somebody says, I am a single
22 parent, and I have children, and I'm too poor to have
23 a nanny or an au pair, and, therefore, please excuse
24 me; and they say, no, you have to find some way of
25 getting here.

1 Are there courts that do that?

2 MR. LAWRENCE: I don't know of a court that
3 arrests people, and I -- in this case, it wasn't a
4 question of arresting. The local judges made a
5 decision: We are going to issue orders to show cause;
6 people will be required to come in. The police
7 decided, no, we're not going to have anything to do
8 with that.

9 And I feel that that's part of the system
10 because the police are part of the system.

11 JUSTICE SCALIA: Mr. Sterling, I don't --
12 you seem to acknowledge that, to make your case, you
13 have to show that Grand Rapids district drew from the
14 pool a disproportionate number of people.

15 Why -- why do you have to prove that? If
16 Grand Rapids contributes to the pool an inordinate,
17 disproportionate number of the minority -- blacks in
18 this case -- even if Grand Rapids simply took back a
19 proportionate number from the pool, it would still
20 have a disproportionate effect on reducing the number
21 of blacks in the overall pool, wouldn't it?

22 MR. LAWRENCE: In order to solve this
23 problem, all that Kent County would have to do is to,
24 if you take people to district court, put back the
25 ones that aren't being used. That would certainly

1 help, but, instead, they take an excess number, like
2 any court does, but the excess people are totally
3 removed from the system.

4 CHIEF JUSTICE ROBERTS: Your answer to
5 Justice Scalia's question is -- is no, right? Because
6 the idea is, if Grand Rapids sends up a pool that's 30
7 percent minority and if it takes back the same number
8 as everybody else, it's going to get -- the county is
9 going to get the same proportion.

10 It's only when they take back more. They
11 have the more heavily African-American pool, and they
12 are going to draw from it more than everybody else is
13 drawing from theirs, so there will be fewer
14 African-Americans to go to the county.

15 MR. LAWRENCE: That is what's happening, but
16 I don't believe --

17 CHIEF JUSTICE ROBERTS: But you have no
18 evidence that Grand Rapids takes back more than its
19 share, proportionally, than anybody else.

20 MR. LAWRENCE: We know that the -- as soon
21 as they stopped doing it, this created a substantial
22 increase in the number of African-Americans on the
23 juries, and I think that that's --

24 CHIEF JUSTICE ROBERTS: At the county level?

25 MR. LAWRENCE: At the county level.

1 CHIEF JUSTICE ROBERTS: Yes. Was there any
2 evidence that your venire -- that minorities were
3 underrepresented on your venire?

4 MR. LAWRENCE: Yes.

5 CHIEF JUSTICE ROBERTS: Where is that in the
6 record?

7 MR. LAWRENCE: Okay. The -- well, it is in
8 the testimony of -- well, if you look, it's -- I'm
9 sorry that I don't have the page number, but right at
10 the time, it was said, we have two or three
11 African-Americans within this group, that was either
12 60 or 100.

13 And I'm sorry that the record is less clear,
14 but even if it is 3 out of 60, you're talking about 5
15 percent, whereas the population is 7.28 percent. If
16 it just happens once or twice --

17 CHIEF JUSTICE ROBERTS: Help me --

18 MR. LAWRENCE: -- not a problem, but it
19 happens every month.

20 CHIEF JUSTICE ROBERTS: Help me -- help me
21 with the math. If there were one more
22 African-American, what would the percentage be?
23 Pretty close to what you're saying it should be,
24 right?

25 MR. LAWRENCE: If there were two more, it

1 would be right on target, just -- it would only be .28
2 percent low, which, if you simply send out a second
3 letter, because the testimony of Kim Foster was that,
4 later on, when they started sending out the second
5 letter, half of the people who did not respond would
6 respond --

7 JUSTICE GINSBURG: Can we go back to your
8 point about -- that there was a big change when the
9 draw came from the circuit first, before the
10 districts. I thought it was agreed that, before,
11 there was an 18 percent, on average, comparative
12 difference and, after, 15 percent. That doesn't sound
13 like a big change.

14 MR. LAWRENCE: But it's a step in the right
15 direction, and what we want to do is we want to
16 promote more minority participation on jurors --
17 juries, instead of creating a rule that tells court
18 administrators all over the country, the heat's off,
19 you don't have to do anything.

20 JUSTICE SCALIA: But a step -- a step in the
21 right direction is not enough. You were adducing that
22 to prove that the prior system had a significant
23 effect, and it turned out, it didn't have a very
24 significant effect. It doesn't prove your point to
25 say, well, it's a step in the right direction.

1 If it's insignificant, it's insignificant.
2 Whether it's insignificant in the right direction or
3 the wrong direction doesn't matter.

4 MR. LAWRENCE: Well, one element of the
5 entire system might be insignificant, but you are
6 talking about numerous elements that went together,
7 and Duren says they have to show what caused the
8 underrepresentation.

9 JUSTICE SCALIA: I still don't -- I don't
10 understand this problem of -- of you have to show that
11 they took back more than they contributed.

12 Let's assume that Grand Rapids is -- is
13 entirely black, and its entire delegation that goes to
14 the pool are all black, okay? And let's assume that
15 those blacks are 10 percent of the -- the totality,
16 and there are no blacks from anywhere else, okay?
17 Then Grand Rapids takes back simply the number of
18 people it -- it took, its set, which would be 10
19 percent, and it takes black -- takes back all of the
20 blacks, who are the Grand Rapids residents.

21 All of the other districts would thereby
22 have zero percent blacks instead of 10 percent, which
23 is what they ought to have.

24 MR. LAWRENCE: Each district, the jurors are
25 acquired from that district --

1 JUSTICE SCALIA: Exactly.

2 MR. LAWRENCE: -- and the circuit is
3 acquired from all the districts of the county.

4 JUSTICE SCALIA: Exactly. So why expect the
5 other districts to have 10 percent blacks simply
6 because Grand Rapids contributed 10 percent of the
7 totality, all of whom were black? There -- then
8 there's a requirement for each district to have
9 10 percent blacks, right? But if Grand Rapids takes
10 back its -- its -- the people it sent, there are no
11 more blacks left to go around.

12 MR. LAWRENCE: Well, I don't expect those
13 outlying districts to have more -- a larger percentage
14 of blacks than the population; I'm only expecting that
15 from the county.

16 JUSTICE ALITO: Isn't that the case --

17 JUSTICE BREYER: So what if --

18 JUSTICE ALITO: If -- if Grand -- if Grand
19 Rapids uses a disproportionate number of jurors in its
20 district courts, then you are going to have this
21 problem -- the only way to fix the problem would be to
22 have a separate jury system for the district courts.
23 If you have the -- the circuit courts going first,
24 then the people in the district courts are going to
25 have the problem that you identify.

1 If you have a system in which it's all done
2 randomly -- circuit court, district court -- the
3 people who come toward the end are going to have the
4 problem. So I don't see any way out of this, if in
5 fact there was a statistical basis for it, other than
6 having a separate selection process for the district
7 courts. Is that what you think is necessary?

8 MR. LAWRENCE: I think that we should allow
9 a great deal of flexibility to local court
10 administrators. As I mentioned in the brief, in the
11 Parents Involved in Community Schools case, there was
12 a discussion in the concurrence by Justice Kennedy
13 about exactly what local governments --

14 JUSTICE BREYER: All right. So is --

15 MR. LAWRENCE: -- can do to -- to get an
16 appropriate representation of minorities without using
17 racial classifications.

18 JUSTICE GINSBURG: That was a question of
19 what was permitted. Here you're trying to say this is
20 required. The schools case was, these are measures
21 the district could take if it wanted to. But you are
22 saying these are measures the district must take
23 because the Constitution requires it. It's quite a
24 different setting.

25 MR. LAWRENCE: Well, I admit that it is a

1 different setting. However, I feel -- well, no, I
2 won't say "I feel." Duren holds that there must be a
3 reasonable connection between the African-Americans
4 that appear on the jury arrays and the population as a
5 whole.

6 JUSTICE BREYER: What about the -- the more
7 I listen, the more I think you think there are a lot
8 of things people could do. They could send three
9 letters; they could explain in the letters why it's
10 important to come; they could try reversing the thing
11 a little bit with the districts first or not first --
12 all kinds of things.

13 But what -- but now you're forcing them into
14 this legal rubric. So what about a decision, which
15 you wouldn't like, probably, but it would say we can't
16 say that they're unreasonable in respect to having all
17 of these, but there -- who knows? You know, when they
18 get around and others try them, et cetera.

19 In other words, unreasonable/reasonable is
20 one standard, and ambiguity plays a -- a role here,
21 too, that might be helpful.

22 MR. LAWRENCE: Well, you are certainly
23 correct, and I would simply say that the people of
24 Grand Rapids looked up at the juries; 98 percent of
25 the time they saw nothing but white faces. I think

1 that Duren requires that the local system do something
2 about it. There's a lot of options. So you should
3 give them flexibility.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. LAWRENCE: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. Restuccia, you
7 have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF B. ERIC RESTUCCIA,
9 ON BEHALF OF THE PETITIONER

10 MR. RESTUCCIA: I just have two brief
11 points. One is that -- I want to just remind the
12 Court that this is a case under AEDPA review, so that
13 the Michigan Supreme Court has to be not just
14 incorrect; it has to be objectively unreasonable.

15 And in conclusion, I think the easiest
16 analysis here is the conclusion that there was no
17 showing of systemic exclusion, because Mr. Smith
18 failed to show that there was any underrepresentation
19 that arose from the jury assignment process, is
20 probably one of the strongest points, because if you
21 look at the 3 percent comparative disparity, that's
22 less than half of 1 percent absolute disparity. No
23 one claims that that's statistically significant.

24 So I think whether it's reviewed under
25 2254(d)(2) or 2254(e)(1), this Court should reverse.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 11:14 a.m., the case in the
5 above-entitled matter was submitted.)

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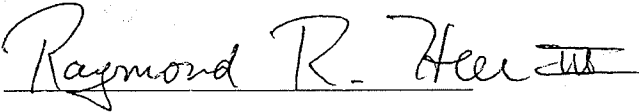
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: MARY BERGHUIS, WARDEN, Petitioner, v. DIAPOLIS SMITH.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer 

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